Supreme Court, U.S.
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Nos. 95-1000 and 95-1002

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN T. HENNESSY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK, ET AL.

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC), acted within its discretion under 12 U.S.C. 1821(e)(1) in repudiating a failed depository institution's severance plan.

2. Whether severance benefits allegedly payable to former employees of an insured depository institution upon their involuntary termination are recoverable against the FDIC, as receiver, as "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 58 F.3d 908. The opinion of the district court in No. 95-1000 (*Hennessy, et al.* v. *FDIC* (Pet. App. 49a-60a)) is reported at 858 F. Supp. 483. The opinions of the district court in No. 95-1002 (*Campbell, et al.* v. *FDIC* (Pet. App. 35a-47a) and *Adolf, et al.* v. *FDIC* (Pet. App. 33a-35a)) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1995. A petition for rehearing was denied on

[1] "Pet. App." refers to the appendix to the petition in No. 95-1002.

September 26, 1995. Pet. App. 70a-73a. The petitions for writs of certiorari in No. 1002 (Hanna Pet.) and No. 1000 (Hennessy Pet.) were both filed on December 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania declared Meritor Savings Bank (Meritor) insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) receiver. Pet. App. 5a. In its capacity as receiver, the FDIC executed a Purchase and Assumption Agreement transferring a portion of Meritor's assets and liabilities to Mellon Bank (Mellon). *Ibid.* Under the terms of the Purchase and Assumption Agreement, the FDIC retained the liabilities not assumed by Mellon and the assets not purchased by Mellon, which it proceeded to liquidate for the benefit of Meritor's approved creditors. *Ibid.*

2. Prior to its insolvency, Meritor had maintained an unfunded employee welfare benefit plan, known as the Separation Pay Plan (SPP). The SPP provided severance benefits (based on years of work, up to a maximum of 26 weeks' salary) to employees who were involuntarily terminated due to "lack of work, job elimination, reorganization or reduction-in-force." Pet. App. 5a. "Lack of work" was a defined term that applied only when, as the "result of a decrease in volume of work to be done, a position [wa]s temporarily not needed." *Id.* at 15a. "Job elimination" occurred under the SPP only when, "as a result of a reorganization, changing business needs, or the sale, closure or relocation of an office, a specific position [wa]s determined to be unnecessary to the company

for an indefinite period of time." *Id.* at 14a. Meritor retained discretionary authority to modify or discontinue the SPP in whole or in part at any time. *Id.* at 6a.

3. On the day the Pennsylvania Secretary of Banking declared Meritor insolvent, the FDIC's closing manager informed the employees that the FDIC would not make severance payments. Pet. App. 7a. At the close of business that day, Meritor's former employees became employees of Keytech Resources, Inc., a company established to provide staffing for the Meritor offices that had been purchased by Mellon. *Ibid.* Mellon paid severance benefits to those employees who were subsequently laid off. Their payments were based on their years of service with Meritor, up to a maximum of four weeks salary per employee. *Ibid.*

4. In July, 1993, four of the current Hanna petitioners (one retiree and three individuals who had been Meritor employees on December 11, 1992) filed suit against the FDIC, as receiver, in the United States District Court for the Eastern District of Pennsylvania on behalf of themselves and a class of similarly situated employees (the *Campbell* suit). The other Hanna petitioners (a group of former Meritor employees and retirees) filed suit against the FDIC solely in their individual capacities (the *Adolf* suit). Ten former Meritor managers (the Hennessy petitioners) also sued the FDIC in their individual capacities (the *Hennessy* suit).[2] Pet. App. 8a-11a. All

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[2] One former Meritor manager, Thomas Callahan, filed his own suit challenging the receiver's denial of severance benefits. Callahan's complaint was identical to that filed by the Hennessy plaintiffs, his case was tried alongside theirs, and the *Hennessy*

three suits sought, *inter alia*, severance benefits under the SPP.[3] *Ibid.*

The Hennessy petitioners argued before the district court that their severance rights under the SPP were triggered because they were terminated as part of a "reorganization." Pet. App 8a. The Hanna petitioners claimed (in *Campbell* and *Adolf*) that they were entitled to severance payments because they were involuntarily terminated due to "job elimination" or "lack of work." *Id.* at 14a. Petitioners all alleged, in addition, that the FDIC did not properly repudiate the SPP under 12 U.S.C. 1821(e)(1), Pet. App. 18a, and that, even if the FDIC did properly repudiate the SPP, they were entitled to severance benefits as "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3), Pet. App. 21a.

On July 29, 1994, the district court ruled for the FDIC in *Hennessy* on the parties' cross-motions for summary judgment. Pet. App. 49a-60a. The court rejected the Hennessy petitioners' assertion that their termination resulted from a reorganization of Meritor. It explained that "the FDIC was involved with the termination of Meritor rather than the continuation of its business." *Id.* at 54a. Because the right to severance had not been triggered, and Meritor (and, later, the FDIC) retained the right to terminate the SPP at will, the court concluded that,

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decisions by the district court and court of appeals disposed of Callahan's claims. Pet. App. 1a, 49a, 70a. Callahan's petition is consolidated with those of the Hennessy plaintiffs.

[3] Among other things, the Hanna petitioners also sought benefits under Meritor's retiree health and life insurance plans. Those claims were rejected by the district court (Pet. App. 43a-44a) and the court of appeals (*id.* at 25a-28a), and they have not been renewed before this Court.

at the time Meritor was closed, the Hennessy petitioners had no vested rights to severance benefits. *Id.* at 55a-56a. The court further concluded that, upon its appointment as receiver, the FDIC had lawfully repudiated the SPP, under 12 U.S.C. 1821(e)(1), and that the Hennessy petitioners' claims for severance benefits were not claims for "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3). Pet. App. 56a- 60a.

Relying on its decision in *Hennessy*, the district court rejected the Hanna petitioners' claims for severance benefits, granting summary judgment for the FDIC in *Adolf* (Pet. App. 33a-34a) and in *Campbell* (*id.* at 35a-47a).

5. The court of appeals affirmed. It agreed with the district court that the closure of Meritor and the appointment of the FDIC as receiver did not trigger a right to benefits under the SPP because those events did not constitute a reorganization. Pet. App. 12a-15a. The court noted that both Congress and the courts have recognized that, unlike a conservator (which preserves the institution as a going concern), a receiver is empowered to liquidate the institution and wind up its affairs. *Id.* at 13a (citing *RTC* v. *Cedar-Minn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (8th Cir.), cert. denied, 113 S. Ct. 94 (1992); *FDIC* v. *Grella* 553 F.2d 258, 261 (2d Cir. 1977); H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 396 (1989)). Here, the court found, the FDIC's sale of some of Meritor's assets to Mellon, Mellon's assumption of some of Meritor's liabilities, and the FDIC's liquidation of the remaining Meritor assets for the benefit of Meritor's creditors were consistent with the winding up of a failed bank's affairs. Pet. App. 13a. In the court's view, to suggest that those transactions constituted a

"reorganization" of Meritor was to "turn a blind eye to the dispositive facts." *Ibid.*

The court also rejected the contentions by the Hanna petitioners that their rights to severance were triggered because they were involuntarily terminated either as the result of "job elimination" or as the result of "lack of work." The court observed that "no specific position" had been determined to be "unnecessary" for an "indefinite period of time," and no employee had been laid off because he or she was "temporarily not needed" as a "result of a decrease in volume of work." Pet. App. 14a-15a. Rather, Meritor's employees lost their jobs because "the Secretary of Banking closed the entire bank." *Ibid.*

The court went on to hold that, even if it were to assume that a triggering event had occurred: (i) petitioners had no vested right to severance pay prior to, or at the time of, the appointment of the FDIC as receiver (Pet. App. 15a-18a); (ii) the FDIC had properly repudiated the SPP (*id.* at 18a-21a); and (iii) petitioners were not entitled to severance benefits as "actual direct compensatory damages" arising from that repudiation (*id.* at 21a-42a).

ARGUMENT

Petitioners contend that this Court should grant certiorari to decide whether the court of appeals erred in holding that their claims for benefits were not claims for "actual direct compensatory damages," within the meaning of 12 U.S.C. 1821(e)(3), arising from the FDIC's repudiation of the SPP. Hanna Pet. 9-22; Hennessy Pet. 15-20. The Hennessy petitioners argue (Pet. 9-15), in addition, that the court of appeals erred in holding that the FDIC lawfully repudiated the SPP pursuant to the FDIC's longstanding view

that the payment of severance benefits is burdensome on the receivership and that the repudiation of a severance plan by the receiver promotes the orderly administration of the institution's affairs. Neither issue is properly presented for resolution in this case.[4] The court of appeals concluded that petitioners were not involuntarily terminated as the result of a reorganization or any other event that would have triggered their rights to benefits under the SPP. Petitioners therefore had no contractual right to severance pay,[5] and they would not be entitled to

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[4] The court of appeals' decision on the second issue is in accordance with the decisions of the other courts of appeals that have spoken to it. See Pet. App. 18a-21a. That issue would not warrant further review even if it were properly raised. The first issue, on the other hand, is one of considerable practical importance that has divided the courts of appeals. Compare *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993) (no liability, because loss of severance benefits does not give rise to actual direct compensatory damages), with *Office and Professional Employees Int'l Union* v. *FDIC*, 27 F.3d 598 (D.C. Cir. 1994) (*OPEU*) (rejecting *Howell*, and concluding that FDIC is liable for severance payments), and *Monrad* v. *FDIC*, 62 F.3d 1169 (9th Cir. 1995) (agreeing with *OPEU*). In an appropriate case, it may merit this Court's review.

[5] The Hanna petitioners have not asked this Court to review the court of appeals' affirmance of the district court's conclusion that their rights to severance under the SPP were not triggered by their termination. Although the Hennessy petitioners' do not, in so many words, propose that this Court review the court of appeals' interpretation of the severance plan, they argue that the court of appeals erred in failing to "put itself in Meritor's shoes and ask what the word [reorganization] meant as used in the SPP." Hennessy Pet. 23; see generally *id.* at 20-26. We believe that the district court and the court of appeals correctly interpreted the SPP. In all events, the court of appeals' holding respecting the meaning of

damages from the FDIC even if this Court were to conclude that the FDIC improperly repudiated the SPP under 12 U.S.C. 1821(e)(1) or that the right to severance payments gives rise to "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).[6]

1. Contrary to petitioners' characterizations (Hanna Pet. 9; Hennessy Pet. 21), the court of appeals held unequivocally that petitioners' involuntary termination did not trigger their rights to severance payments. The court stated plainly that it was "unpersuaded by [petitioners'] argument" and that it "agree[d] with the determination of the district court" that neither the facts nor the law "support[ed] the conclusion that the Hennessy plaintiffs were terminated as part of a reorganization." Pet. App. 12a-13a. The court elaborated as follows:

> The Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor Savings Bank. The FDIC was appointed receiver and it sold some of Meritor's assets to Mellon. As part of this transaction, Mellon agreed to assume some of Meritor's liabilities. The FDIC proceeded to liquidate the remaining assets of Meritor for the benefit of Meritor's creditors. These actions are commensurate with the winding up of a failed

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the SPP is a matter of no general importance and warrants no further review.

[6] The Hennessy petitioners conceded below (C.A. Reply Br. 5) that the issue whether their claims were provable in the receivership "presents itself only if the Court [were to conclude] that the events of December 11 * * * triggered the plaintiffs' SPP rights." See also *id.* at 7-8 (reiterating the point).

> bank's affairs and the proper function of a receiver. To suggest that these actions constituted a reorganization of Meritor would turn a blind eye to the dispositive facts. *We therefore cannot conclude that the district court erred in its determination that Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay.*

Id. at 13a (emphasis added).

The court of appeals also clearly rejected the Hanna petitioners' claim that they were entitled to severance pay because of "job elimination" or "lack of work." After reviewing the definitions of those terms within the SPP, the court held that it "[could] not conclude" that " 'job elimination' triggered a right to severance pay," or that "a 'lack of work' as defined by the plan, triggered the right to severance benefits." Pet. App. 15a. The court of appeals' opinion flatly contradicts petitioners' assertion (Hanna Pet. 9) that the court harbored doubt about whether petitioners established a contractual right to severance pay.[7]

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[7] The court of appeals did note that, because it held that the FDIC had properly repudiated the SPP, it did not need to address the Hennessy petitioners' alternative contention (made for the first time at oral argument) that they had contractual rights to severance benefits on the bases of "job elimination" or "lack of work." Pet. App. 15a n.7. The absence of a decision below specifically addressing the Hennessy petitioners' belated contention does not mean that those petitioners have an unresolved contract issue that would have to be resolved on its merits if this Court were to reverse the court of appeals on the repudiation issue. Under well established law, the Hennessy petitioners waived their claims for severance benefits on the grounds of "job elimination" or "lack of work" by failing to raise those claims in the district court or in their appellate briefs, particularly in light of the fact that their belated claims

2. Petitioners cite the court of appeals' reference to its normal practice of committing the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced (Pet. App. 18a) to support their assertion that "the court affirmed the district court's grant of summary judgment, solely on the ground that the FDIC had properly repudiated the Separation Plan and owed no damages under it." Hanna Pet. 11; see also Hennessy Pet. 21. The relevant passage of the court's opinion, however, emphasizes that the repudiation-related issues now raised by petitioners before this Court were addressed by the court of appeals only as alternative bases for affirming the district court.

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rely on factual assertions not developed in the record below. See *Hutchins* v. *IRS*, 67 F.3d 40, 45 (3d Cir. 1995) (refusing to consider issue raised for the first time in reply brief, and noting that waiver ruling was particularly appropriate because issue would require further factual development); *McLendon* v. *Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990).

Even if the Hennessy petitioners had not waived their claims for severance benefits on grounds of "job elimination" and "lack of work," those claims are foreclosed by the court of appeals' holding that those triggering events did not occur. The Hennessy petitioners' untimely assertion that they did not receive the November, 1989, plan documents defining "job elimination" and "lack of work," even if true, is of no consequence, because the Hennessy petitioners conceded in the district court that the November, 1989, revisions to the earlier plan document (which they did receive) did nothing "other than clarify the separation pay policy that had been in place prior to that time." Hennessy Pltf.'s Mem. Supporting Mot. for Summary Judgment 7-8 (quoting author of November 1989 document).

The court stated:

> *Having determined that there was no event that triggered the payment of severance benefits*, it would ordinarily be unnecessary to dispose of the other issues raised by the parties regarding their entitlement to severance pay, *i.e.*, repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various 'triggering' provisions, and have at least implied that they are susceptible to more than one reasonable interpretation.

Pet. App. 18a (emphasis added). The court then went on to address alternative bases for affirming the district court. In doing so, however, the court indicated that it was not abandoning its antecedent holding that no triggering event had occurred. See *Ibid.* (noting that the court of appeals would rule for FDIC "even if [the court] were to assume a triggering event had occurred").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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